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IN THE

Supreme Court of the United States

October Term, 1950

No. 361

GOLD FUEL SERVICE, INC., a Corporation of the State of New Jersey,

Petitioner-Petitioner

vs.

ESSO STANDARD OIL COMPANY, a Corporation of the State of Delaware,

Defendant-Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

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OCTOBER TERM, 1959.

No.

GOLD FUEL SERVICE, INC., a Corporation of the State of New Jersey,

Plaintiff-Petitioner,

vs.

ESSO STANDARD OIL COMPANY, a Corporation of the State of Delaware,

Defendant-Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

Opinions Below.

The opinion of the Chancery Division of the Superior Court of New Jersey is reported at 59 N. J. Super. 6, 157 A. 2d 30. The opinion of the Supreme Court of New Jersey is reported at 32 N. J. 459, 161 A. 2d 246 and appears at page 17 of the petition.

Jurisdiction.

Respondent contends that jurisdiction under 28 U. S. C. §1257 is lacking for the following reasons:

No Federal question is presented in that petitioner has failed to assert a claim of denial of a federal right and has

consistently asserted rights based only on the common law of New Jersey.

Questions Presented.

1. Does this Court have jurisdiction under 28 U. S. C. §1257 to grant a writ of certiorari where the petitioner has relied only on the common law of New Jersey and has failed to state what federal right has been denied?

2. Do "special and important reasons" exist within the meaning of Rule 19 of the Revised Rules of this Court for the granting of the writ where authority for the existence of any federal right which petitioner might be claiming is entirely lacking and where petitioner has sought identical relief in the District Court for the District of New Jersey?

3. Did the Supreme Court of New Jersey commit error in deciding that all causes of action arising under the anti-trust laws, 15 U. S. C. §§1, 2 and 13a, were within the exclusive jurisdiction of the federal courts?

Statement of the Case.

This action was originally brought against the Esso Standard Oil Company (hereinafter referred to as "Esso"), a manufacturer and distributor of fuel oil, and Cooper-Alloy Corporation (hereinafter referred to as "Cooper") and Stainless Engineering and Machine Works (hereinafter referred to as "Stainless"), two consumers, upon a theory of maliciously interfering and unfairly competing with Gold Fuel Service, Inc. (hereinafter referred to as "Gold") which had formerly been supplying the consumer defendants (R1a). Before any of the defendants

had filed their answers, Gold's motions to amend its complaint and to dismiss as to Cooper and Stainless were granted and the case continued against Esso, although on a somewhat altered theory (R6a).

In the amended complaint, Gold repeated its allegations of unfair competition, but based those charges on asserted violations of the Robinson-Patman and Sherman Acts, 15 U. S. C. §§13a, 1 and 2. Esso then moved to dismiss this amended complaint on the ground that no claim for relief had been stated, coupled with a motion for summary judgment supported by affidavits. These motions were granted and judgment entered thereon (R23a). (See report of case at 59 N. J. Super. 6, 157 A. 2d 30.) On appeal, the New Jersey Supreme Court affirmed (P17). 32 N. J. 459, 161 A. 2d 246.

Gold, or its predecessor, a distributor of fuel oil, had been supplying Cooper and Stainless with a major portion of their requirements for some years prior to 1958. These consumers became dissatisfied with the price at which said oil had been furnished to them and decided to investigate the possibility of savings in this connection, both as to price and as to the type of oil being used. Gold was advised of this change in attitude and, shortly thereafter, reduced its price slightly from 12.7 to 12.5 cents per gallon (R17a).

During October, 1958, an executive of both consumer companies met with Esso's Industrial Sales Manager, explained the price problem and invited Esso to survey the consumers' operations and submit a bid. In view of the quantities of oil consumed by Cooper and Stainless, Esso's Industrial Sales Manager believed that they should purchase their oil requirements on a "tank transport" basis, and he advised them that Esso sold oil to purchasers in such quantities. During these negotiations, the price for "tank transport" quantities was 10.05 cents per gallon

plus a haulage charge if delivery were to be made by Esso (R16a).

After a survey of the consumers' plant, Esso concluded that the type of fuel oil purchased from Gold should be continued and orally advised them that Esso would furnish the oil at the prevailing price plus a normal delivery charge, then 10.05 cents per gallon plus .33 cents for freight (R14a-15a). This offer was subsequently put into writing and sent to the consumers (R15a).

Shortly after this quotation was submitted, Esso learned that several other suppliers had been invited by the consumers to bid for this business and at least one had quoted a delivered price of 10.2 cents per gallon. The consumers, preferring to do business with Esso, asked whether or not Esso wished to meet this price. Esso revised its quotation to meet this competitive situation, and its bid of 10.2 cents per gallon (10.05 cents per gallon plus a reduced delivery charge of .15 cents) was accepted (R17a).

Gold had been invited to compete with the other suppliers, but its price of 11.4 cents per gallon, delivered, was the highest quotation and was 1.2 cents per gallon in excess of the lowest quotation. It should be noted that Gold, in attempting to compete in the bidding, had reduced its price from 12.5 cents, itself a reduction of its former price, to the 11.4 figure (R21a).

Although the petition attempts to supply confusion as to the proper delivered price of the oil as of December 16, 1958, the date when Esso commenced delivery (P6, 7), the delivered price at that time under Esso's proposal was 11 cents per gallon. This consisted of the original delivered price of 10.2 cents plus the November 21st increase of .5 cents and the December 16th increase of .3 cents.

There is no denial, by petitioner, of the manner in which bids were invited nor of the prices which defendant has

set forth. Gold has never contradicted the assertion that it was unable to compete, not only with Esso, but with other bidders for the job. Significantly it does not refute the statement that any consumer could have purchased fuel oil in the quantities in question at the price noted, and the very issues of the "Journal of Commerce" upon which Gold relies (R43a-87a) show a lower price to a reseller than a consumer (R29a).

Both the original and amended complaints alleged the common law tort of interference with business relations based upon unfair competition. In the amended complaint, there was no basic alteration, but alleged violations of the Sherman and Robinson-Patman Acts, 15 U. S. C. §§1, 2 and 13a were added. Gold contended that these statutes set forth a standard which is absorbed into the public policy of New Jersey and the violation thereof, it maintained, constituted a basis for recovery on the common law theory of trespass on the case or unfair competition. Although Gold urged that no relief was sought under the federal statutes, it appeared that no relief could conceivably be granted upon the facts as set forth by Gold, except thereunder. (See opinion of the Chancery Division of the Superior Court at 59 N. J. Super. 6, 157 A. 2d 30.)

An appeal was taken by Gold from the judgment of the Chancery Division and the Supreme Court of New Jersey affirmed the lower court's decision. This affirmance was restricted to the question of jurisdiction to entertain the common law cause of action asserted by plaintiff, the court holding that the cause of action, if any, was solely for violation of the federal statutes and, as such, was cognizable only in the federal courts (P17). The present petition for the issuance of a writ followed.

Reasons for Denying the Writ.

POINT I.

This Court has no jurisdiction to review in that the petitioner's entire cause of action is based on the common law of New Jersey.

Review of the decision of the Supreme Court of New Jersey is afforded by way of writ of certiorari only in the event that the petitioner has fulfilled the statutory requirements of 28 U. S. C. §1257 (c). The pertinent portion of that statute allows review:

> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

An examination of the record in the cause not only reveals a failure to claim any right, privilege or immunity of the required character, but affirmatively sets forth an asserted cause of action within the framework of the New Jersey common law.

The complaint seeks relief for unfair competition and a malicious interference with business relations (R8a). The means by which the unfair competition and malicious interference were carried out are alleged to be through violations of the anti-trust laws, 15 U. S. C. §§1, 2 and 13a, but these statutory sections are not relied upon except as

a so-called "standard" which are alleged to have become a part of New Jersey's public policy.

Thus, at page 18 of the petitioner's brief below it is said:

> **"F. The amended complaint adequately sets forth a claim upon which relief can be granted, i. e., the actionable tort of unfair competition, in that the defendant's competition with the plaintiff was conducted by illegal means, per violation of federal anti-trust statutes.**
>
> "It is respectfully urged that the amended complaint was not vulnerable to the motion to dismiss, for the reason that it sets forth sufficiently a claim for relief for an actionable tort of unfair competition. The competition is unfair because it involves the pursuit of illegal, criminal means, the success of such competition being grounded upon violation of 15 U. S. C. A. 1, 2 and 13a."

And at page 29, petitioner asserted:

> "It cannot be overemphasized that the instant action is *not* upon any of the federal anti-trust statutes, but is at common law for the tort of unfair competition by illegal means."

At pages 33 and 34, respectively, the following contentions are advanced:

> "By the antitrust statutes relied upon at bar by the plaintiff, such acts are illegal, and therefore enable the plaintiff to maintain a common-law action for damages in a state court—the one below—for illegal, i. e., unfair, competition."
>
> * * * * * *
>
> "A state court has jurisdiction on the basis of the general principles of the law of torts to give a

> private remedy when a competitor has been injured by unfair competition. The federal statutes set a standard of unfair competition."

It is, therefore, clear that no federal right has ever been asserted by petitioner, but, instead, it has sought relief by means of the New Jersey common law action of trespass on the case (R26a). The Supreme Court of New Jersey has declared that its public policy does not require the entertaining of such a cause of action and has also pointed out that petitioner's remedy, if any, lies in the federal courts. Under such circumstances this court has no basis for review, for it is bound by the decision of the state court as to its law. *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 680 (1930); see also *Scripto* v. *Carson*, 362 U. S. 207, 210 (1960); *Williams* v. *Kaiser*, 323 U. S. 471, 473 (1944); *General Trading Co.* v. *State Tax Comm'n.*, 322 U. S. 335, 337 (1943); *American Railway Express Co.* v. *Kentucky*, 273 U. S. 269, 272, 273 (1927). The refusal of the state courts to exercise jurisdiction, in itself, presents no denial of a federal right, such determination being a matter purely of state law and, in the absence of federal questions, not reviewable by this court. *Kersh Lake Dist.* v. *Johnson*, 309 U. S. 485, 489 (1940); *Smith* v. *Adsit*, 16 Wall. (83 U. S.) 185, 189 (1872); *Caldarola* v. *Eckert*, 332 U. S. 155, 158 (1947).

Petitioner relies upon Article VI, Clause 2, the Supremacy Clause of the United States Constitution, and cites other authority for the proposition that it is the duty of the State courts to guard and enforce every "right" secured by federal law (P13). This may be conceded, but the federal "right" now alleged is contrary to the cause of action heretofore asserted in this case. On page 13 of the petition, it declares:

> "The New Jersey courts *may* give relief from the tort of unfair competition, since this action is not one

for the enforcement of sections 2 and 13a of 15 U. S. C." (emphasis added).

However, no authority is cited for the proposition that, under the Supremacy Clause, there is a "right" to have the courts of the State of New Jersey provide a common law cause of action for unfair competition based upon the standards set forth in the anti-trust laws. Such a contention cannot be sound, for, surely, it is the duty of the New Jersey Courts to declare any unresolved question of policy.

The identification of the precise federal right alleged is very difficult from an examination of the petition. Much is made of the various provisions of Title 15, U. S. C. but, as noted above, the alleged violations thereof merely set up a "standard" which, it is claimed, New Jersey should enforce.

It is a settled rule of this Court that the assertion of a claim of the denial of a federal right sufficient to give this court jurisdiction must be made unmistakably by way of distinct and positive averments, and not left to mere inference, and it must appear that the party claiming the right plainly and distinctly indicated to the state court that such right was claimed under the Constitution, treaties or statutes of the United States. This principle applies even though the party seeking review may, in point of fact, have had a federal right which could have been asserted. The failure to present the federal question is sufficient. *Oxley Stave Co.* v. *Butler County*, 166 U. S. 642, 654-655 (1897). See also *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291, 308-310 (1903); *Bolln* v. *Nebraska*, 176 U. S. 83, 91-92 (1900); *Dewey* v. *Des Moines*, 173 U. S. 193, 198-200 (1899); *Kipley* v. *Illinois*, 170 U. S. 182, 186-187 (1898); *Levy* v. *Superior Court*, 167 U. S. 175, 177-178 (1897).

As the court stated in *Dewey* v. *Des Moines* at page 199,

> "Although no particular form of words is necessary to be used in order that the Federal question may be said to be involved, within the meaning of the cases on this subject, there yet must be something in the case before the state court which at least would call its attention to the Federal question as one that was relied on by the party, and then, if the decision of the court, while not noticing the question, was such that the judgment was by its necessary effect a denial of the right claimed or referred to, it would be sufficient. It must appear from the record that the right set up or claimed was denied by the judgment or that such was its necessary effect in law. *Roby* v. *Colehour*, 146 U. S. 153, 159; *Chicago, Burlington &c. Railroad* v. *Chicago*, 166 U. S. 226, 231; *Green Bay &c. Company* v. *Patten Paper Company*; and *Bank of Lincoln* v. *Bank of Cadiz*, *supra*."

Petitioner has not made clear, either in this petition or below, exactly what federal right is claimed to have been denied. As the Court may readily observe, respondent has been compelled to formulate its argument on the basis of a federal right which has not been asserted by petitioner, but which has been arrived at by respondent by means of conjecture. Certainly, if petitioner has asserted a denial of any federal right, it has, at best, been left to mere inference.

Parenthetically, it would also appear pertinent at this juncture to note Rule 24(5) of the Revised Rules of this Court which states:

> "The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

It is apparent from the foregoing discussion that petitioner has not only failed to assert a federal right, but it has based its claim on the state law. If some nebulous federal right may exist under the circumstances of the case at bar, it has not been defined with that degree of precision which would permit appellate review.

POINT II.

There are no special and important reasons for allowing this petitioner to litigate in the New Jersey courts where all relief to which it may be entitled is available in the federal courts.

Rule 19 of the Revised Rules of this Court requires that the allowance of a writ be based on substantial considerations. No such reasons are advanced in the petition and none can be discerned. Indeed, the pursuit of a remedy under state law on such a bizarre theory would seem to be superfluous in view of the fact that petitioner is also suing in the federal court for the District of New Jersey for the same relief sought herein (R26a). In that litigation treble damages are sought directly for violations of the very statutes mentioned herein.

It is respondent's position that the petition is so devoid of merit as to be frivolous, since any issue involving federal law which it might raise would be so unfounded in substance as not to be cognizable in this Court. See *Wilson* v. *North Carolina*, 169 U. S. 586, 595 (1897), citing *Hamblin* v. *Western Land Co.*, 147 U. S. 531, 532 (1893). See also, *Corrigan* v. *Buckley*, 271 U. S. 323, 329 (1926); *United States Fidelity & Guaranty Co.* v. *Oklahoma*, 250 U. S. 111, 112 (1919); *Parker* v. *McLain*, 237 U. S. 469, 471-472 (1915); *Iowa* v. *Rood*, 187 U. S. 87, 92 (1902); *New Orleans Water-*

works Co. v. *Louisiana*, 185 U. S. 336, 344 (1902); *New Orleans* v. *New Orleans W. W. Co.*, 142 U. S. 79, 87 (1891). These cases demonstrate that the requirement of substance has been considered jurisdictional by this Court.

POINT III.

Exclusive jurisdiction of violations of the statutes in question lies with the federal courts.

Assuming that the petitioner is entitled to a day in court on the merits, the Supreme Court of New Jersey was clearly correct in holding that the federal courts had exclusive jurisdiction of any cause of action that petitioner may have. The cause of action asserted below was actually a curious hybrid which combined various elements of common law unfair competition and the federal anti-trust statutes (P17). Petitioner admits (P14) that the acts of respondent would not give rise to a common law cause of action for unfair competition and summary judgment in the trial court was, in part, based upon such admission. See 59 N. J. Super. at 12, 157 A. 2d at 33. There being no existing New Jersey common law action based on federal anti-trust standards, the trial court concluded (59 N. J. Super. at 17, 157 A. 2d at 35), and the New Jersey Supreme Court agreed (P17), that the state courts have no jurisdiction over this type of case since it is based solely on federal statutes, the enforcement of which is within the exclusive jurisdiction of the federal courts.

As was declared under Point "I" herein, no authority has been cited for a theory that the Supremacy Clause requires the state to provide a right of action based upon federal anti-trust statutes. On the contrary, many decisions of this Court as well as the lower federal courts hold

that the enforcement of these laws is within the exclusive jurisdiction of the federal courts. *General Investment Co. v. Lake Shore & Mich. Southern Ry. Co.*, 260 U. S. 261 (1922); *Caraway v. Ford Motor Company*, 148 F. Supp. 776 (Dist. Ct., W. D. Mo., 1957); *Caraway v. Ford Motor Company*, 144 F. Supp. 295 (Dist. Ct., W. D. Mo., 1956); *United Artists Corp. v. Ancare Amusement Corp.*, 91 F. Supp. 132 (Dist. Ct., S. D. N. Y., 1950); *Bee Machine Co. v. Freeman*, 42 F. Supp. 938 (Dist. Ct., D. Mass., 1942), rev'd on other gr'ds 131 F. 2d 190, aff'd 319 U. S. 448; *Southern States Oil Co. v. Standard Oil Co.*, 26 F. Supp. 633 (Dist. Ct., E. D. S. C., 1939). The remedies provided thereby are exclusive. *Geddes v. Anaconda Mining Co.*, 254 U. S. 590 (1921); *Wilder Mfg. Co. v. Corn Products Co.*, 236 U. S. 165 (1915). See also *Switchmen's Union v. Board*, 320 U. S. 297 (1943); *Stewart v. Baltimore & Ohio R. R. Co.*, 168 U. S. 445 (1897); *Fourth National Bank v. Franklyn*, 120 U. S. 747 (1886); *United States v. Kaufman*, 96 U. S. 567 (1877); *Pollard v. Bailey*, 20 Wall. (87 U. S.) 520 (1874).

As was stated above, petitioner has recognized the force of these authorities by seeking the very relief provided by the statutes which he cites in an action which is currently pending in the District Court for the District of New Jersey.

This policy of exclusion has been followed in the most recent decisions of this Court. In *Kelly v. Kosuga*, 358 U. S. 516 (1959), reh'g den. 359 U. S. 962, the plaintiff contended that the lower court erred in striking an affirmative defense based on the argument that the contract sued upon was a part of a scheme in violation of section 1 of the Sherman Act. On certiorari, the Supreme Court affirmed, stating, per Mr. Justice Brennan, at p. 518:

"As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court. This has been notably the case where the plea has been made by a purchaser in an action to recover from him the agreed price of goods sold. In *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, one who had purchased merchandise from a firm allegedly a combination in restraint of trade was not allowed to set up that fact as a defense to an action for the purchase price. In *D. R. Wilder Mfg Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, Corn Products sold merchandise to Wilder with a standing offer, of which the latter apparently had sought to take some advantage, to give Wilder a rebate if it bought exclusively from it. Again, in an action by the seller, Corn Products, to recover the agreed price, the purchaser, Wilder, was denied any defense of illegality based on the Sherman Act. The Court observed that the Sherman Act's express remedies could not be added to judicially by including the avoidance of private contracts as a sanction. *Id.*, at 174-175. Cf. *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743, 755. See *A. B. Small Co.* v. *Lamborn & Co.*, 267 U. S. 248, 252, generally to the same effect. Obviously, state law governs in general the rights and duties of sellers and purchasers of goods, and, while the effect of illegality under a federal statute is a matter of federal law, *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 176-177, even in diversity actions in the federal courts after *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, still the federal courts should not be quick to create a policy of nonenforcement of contracts beyond that which is clearly the requirement of the Sherman Act."

And in *Nashville Milk Co.* v. *Carnation Co.*, 355 U. S. 373 (1957) reh'g den. 355 U. S. 967, the Court had occasion

to consider the exclusive nature of the criminal section of the Robinson-Patman Act. At page 377 the Court stated:

> "* * * The important thing to note is that this section, in contrast to §1 of the Robinson-Patman Act, does not on its face amend the Clayton Act. Further, §3 contains only penal sanctions for violation of its provisions; in the absence of a clear expression of congressional intent to the contrary, these sanctions should under familiar principles be considered exclusive, rather than supplemented by civil sanctions of a distinct statute. See *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, 174-175."

See also *Safeway Stores, Inc.* v. *Vance, Trustee*, 355 U. S. 389 (1958), reh'g den. 356 U. S. 910.

Petitioner has also advanced the proposition that a civil cause of action will lie in the state courts for the alleged violation of the Robinson-Patman Act, 15 U. S. C. §13a. Such a contention is clearly untenable in view of the *Nashville* case *supra*. At pages 378-379 thereof this court said:

> "Because there is a partial overlap between the price-discrimination clauses of §3 of the Robinson-Patman Act (see note 1, *supra*) and those of §2 of the Clayton Act, as amended by the first section of the Robinson-Patman Act, it is argued that it would be anomalous to allow a private cause of action for price discrimination in violation of §2 of the Clayton Act but to deny a private cause of action based on a violation of §3 of the Robinson-Patman Act. This argument, however, overlooks the fact that §3 of the Robinson-Patman Act includes a provision which is *not* found in §2 of the Clayton Act, namely, selling 'at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.'

> It is not an idle conjecture that the possibility of abuse inherent in a private cause of action based upon this vague provision was among the factors which led Congress to leave the enforcement of the provisions of §3 solely in the hands of the public authorities, except to the extent that violation of any of its provisions also constituted a violation of §2 of the Clayton Act, and as such was subject to private redress under §§4 and 16 of that Act. * * *"

This Court concluded, at page 382:

> "For the foregoing reasons, we hold that a private cause of action does not lie for practices forbidden only by §3 of the Robinson-Patman Act. To the extent that such practices also constitute a violation of §2 of the Clayton Act, as amended, they are actionable by one injured thereby solely under that Act. Since no such infringement of §2 is alleged here, the complaint in this case was properly dismissed."

Respondent submits that, under the *Nashville Milk Co.* decision, no private remedy is available under section 13a of 15 U. S. C. in the state courts or in the federal courts, and that any contention that this section is enforceable in the state courts is unsound, especially in light of the authority cited above with respect to exclusive nature of the jurisdiction of the federal tribunals.

Conclusion.

It is evident from this brief review of the record below that no federal right was ever asserted and that a novel common law theory was advanced. This theory was rejected by the New Jersey courts and the petitioner left to any

remedies it may have under the statutes in question as provided by Congress in the federal courts. The writ of certiorari should be denied.

By JOHN J. MONIGAN,
Attorney for Defendant-Respondent,
Esso Standard Oil Company.

DATED: September 16, 1960.